Supreme Court, U. S.
F E D
AUG 18 1980
MICHAEL RODAK, JR., CLERK

NO. 80-238

IN THE

SUPREME COURT OF THE UNITED STATES

* * * * * * * * * * * * * * * * *

DENNIS JAMES BARTLETT,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

* * * * * * * * * * * * * * * * *

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

* * * * * * * * * * * * * * * * *

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ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED

1. Whether peeping between a crack and under a garage door is a search within the plain view exception.

2. Whether the petitioner's confession was admissible when the petitioner had requested a lawyer and the interrogation continued without benefit of counsel.

3. Whether the petitioner's probation revocation hearing was conducted in accordance with minimum standards of due process.

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NO.

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DENNIS JAMES BARTLETT,

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v.

STATE OF ALABAMA,

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* * * * * * * * * * * * * * * * *

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF ALABAMA

* * * * * * * * * * * * * * * * *

The petitioner, Dennis James Bartlett, respectfully prays that a writ of Certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of the State of Alabama entered in two separate proceedings on March 18, 1980.

OPINIONS BELOW

The opinions of the Alabama Court of Criminal Appeals, not yet reported, appear in the Appendix hereto. The Supreme Court of the State of Alabama denied Certiorari in both cases submitted for review to this Court, noting it did not approve of all of the statements of law made in the opinion of the Alabama Court of Criminal Appeals. The opinions of the Alabama Supreme Court, not yet reported, appear in the appendix hereto.

JURISDICTION

The judgments of the Alabama Court of Criminal Appeals was entered on March 18, 1980. Timely applications for rehearing were denied on April 22, 1980. Timely petitions for Certiorari to the Alabama Supreme Court were denied on June 20, 1980, and this petition for Certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution:

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated.

Amendment V

No person shall be compelled in any criminal case to be a witness against himself.

Amendment XIV

Nor shall any state deprive any person of life, liberty or property without due process of law.

STATEMENT OF THE CASE

The petitioner seeks review of a judgment convicting him for grand larceny of an acetylene welder set and sentencing him to imprisonment for five years. In addition, petitioner seeks review of a hearing revoking petitioner's probation arising from his arrest on the above noted charge of grand larceny.

Prior to trial, petitioner filed a motion to suppress oral and written statements given to law enforcement officials (TR-224), and a motion to suppress evidence seized by law enforcement officials in a warrantless search (TR-227). The trial court denied each of these motions in a hearing conducted during the trial of the action (TR-160,161). The petitioner also objected to the admission of the confessions in evidence (TR-179,180) on the grounds assigned in the written motion. The motion to suppress the confession alleged the statements were obtained in violation of the petitioner's privilege against self incrimination and his right to counsel under the Fifth and Sixth Amendments to the United States Constitution, and were the fruit of an unlawful search prohibited by the Fourth Amendment to the United States Constitution. The motion to suppress the physical evidence alleged the search and seizure of the physical evidence was illegal and violated the Fourth Amendment. At each stage of the appellate proceedings, the petitioner properly raised these adverse rulings in his briefs as provided in the Alabama Rules of Appellate Procedure.

The Alabama Court of Criminal Appeals ruled the confessions were admissible and that the physical evidence was seized in lawful search and seizure. On petition for writ of Certiorari to the Alabama Supreme Court, the admissibility of the confessions and the physical evidence were raised as error and argued in brief.

At the probation revocation hearing, petitioner moved for a continuance on the grounds of lack of opportunity to prepare a defense (TR-3,4). This motion was denied (TR-4) by the trial court. This adverse ruling was raised on

appeal by brief in the Alabama Court of Criminal Appeals, which affirmed the trial Court's decision on the basis of its decision in the grand larceny case. The Alabama Supreme Court denied Certiorari, without opinion, on this issue raised by petitioner.

The owner of the welding set reported the theft to Deputy Spradlin of Alabama's Cullman County Sheriff's Office. Deputy Spradlin obtained a description of the property and the names of three people that had recently been engaged in construction work at the site where the welding set was removed. One of the three named was petitioner. The deputy and another officer proceeded to petitioner's home and were told by petitioner's wife he was not at home. The deputy then asked the wife if he could look in the garage and she refused.

Between petitioner's house and his neighbor's house is located a two door garage. Half of the garage is on petitioner's lot, and half of the garage is on the neighbor's lot. Neither the petitioner nor his neighbor owns their respective premises, rather each are rental tenants.

Immediately after the wife's refusal and proceeding from the petitioner's house to the neighbor's house, the deputy went by the garage and looked through and under the closed garage doors and observed the welding set. The officers went to the neighbor and told the neighbor stolen property was in the garage, and then obtained permission to search the neighbor's side of the garage. There was no wall or barrier of any kind separating the garages, upon entering the neighbor's side, the deputies could observe the welding set.

While the deputies were searching the garage, petitioner drove up and the Deputy stated to petitioner "I need to know where the acetylene tank came from." Petitioner then consented to a search of the premises.

Petitioner was then taken to the Cullman County jail and advised of his Miranda rights. At that time, petitioner stated he would like to call his lawyer.

Petitioner called an attorney, but was unable to talk with him. The Deputy continued questioning the petitioner, who continued attempting to contact his attorney. Finally, the petitioner proceeded to make a statement. His attorney came in towards the end of the statement. There was a consultation with the attorney. Then, the last two sentences of the confession (TR-100,101) were completed.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT ON A FEDERAL QUESTION OF SUBSTANCE.

The Fourth Amendment of the United States Constitution prohibits unreasonable search and seizures. The decisions of this Court make it clear that only in "a few specifically established and well-delineated situations may a warrantless search of a dwelling withstand constitutional scrutiny, and the burden rests on the state to show the existence of such an exceptional situation, Vale v. Louisiana, 399 U.S. 30 (1970).

Relying on the consent of the neighbor, the court below held there was consent to the search. This conclusion is not supported by the facts presented. The illegal search, the deputy peeping through cracks in and under the closed doors, occurred before alleged consent was given by the neighbor and after the refusal by the wife of the petitioner. In fact, the deputy told the neighbor stolen property was in the garage at the time he requested permission to enter her side of the garage.

The issue then is whether the peeping was within the plain view exception. The common thread in "plain view" cases is that the police officer had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused, Coolidge v. New Hampshire, 403 U.S. 443 (1971). The doctrine has been applied where a police officer is not searching for evidence against the accused, but which nonetheless he inadvertently comes across, see Coolidge,

supra. The peeping by the deputy was a general search of an unlimited nature. This illegal search tainted any physical evidence thereafter obtained in the garage.

The peeping search is not justified by the two objectives specified in Coolidge, supra. The first objective is that the magistrate's scrutiny is intended to eliminate searches not based on probable cause, or an extraneous valid reason for the officer's presence justifies the initial intrusion. The second objective is that the searches deemed necessary should be as limited as possible.

The deputy's initial intrusion was not based on an arrest or search warrant, or on any other valid extraneous reason. The intrusion was per se unreasonable and of the type abhorred by our founding fathers and colonists. A police officer does not have a license to be a "peeping tom".

The deputies' intrusion was not inadvertent as invisioned by Coolidge, supra at 469, which made inadvertent discoveries a limitation on the plain view exception. The Cullman County authorities had ample opportunities to secure a search warrant of the premises, if probable cause existed. They knew the defendant's address and had a description of the welder. The plain view exception will not justify the search and seizure.

The next issue is whether the custodial confession of the defendant was admissible in view of Miranda v. Arizona, 384 U.S. 436 (1966), and the absence of counsel. The petitioner had requested a lawyer prior to the confession given at the Cullman County, jail. Despite this request, the custodial interrogation continued and blossomed into a confession.

The right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege, Miranda, supra. The Miranda decision holds:

> If the individual states that he wants an attorney, the interrogation must cease until

> an attorney is present. At that time, the individual must have an opportunity to confer with his attorney and have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.
>
> . . . If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.
>
> . . . The record must show . . . that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not a waiver. (at p. 474,475)

Upon being read the required warnings, the petitioner immediately stated he wanted to call his lawyer. The lawyer was not immediately available and the interrogation continued. Before the attorney arrived, the damaging admissions were made. While the literal words used by the petitioner are not the exact wording used by the Court in Miranda, their import is clear. Substance over form should control. The petitioner wanted a lawyer and the state did not respect his constitutionally guaranteed wishes. The continuing interrogation casts the heavy burden on the state to show a knowing and intelligent waiver.

The court below did not recognize or apply this burden. It merely concluded:

> . . . we cannot say that the failure to wait longer was any more attributable to the officer that to defendant.

The waiver contemplated in Miranda is not in the record. The petitioner did not reject the offer of counsel. The circumstances present in the case at bar were described in Miranda as follows:

> . . . the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so.

The confession admitted in the evidence was not voluntary and not given after waiver of the right to counsel.

The remaining issue concerns the conduct of the petitioner's probation revocation hearing. The hearing was conducted on Tuesday, February 20, 1979. Counsel for the defendant learned of the hearing on the Thursday before, February 15, 1979. While the petitioner requested a continuance to have an opportunity to prepare, the motion was denied. The petitioner was given notice of the hearing, but not notice of the charges against him and neither was the petitioner given any written statement by the trial court afterwards as to the evidence relied on and reasons for his probation revocation.

In Morrisey v. Brewer, 408 U.S. 471 (1972) and Gagnon v. Scarpelli, 411 U.S. 778 (1973), this Court announced the minimum requirements of due process in probation revocation hearings. These requirements include written notice of the claimed violations of probation, and a written statement by the factfinders as to the evidence relied on and reasons for revoking probation. Neither of these standards were met below.

The hearing was not in accordance with the standards of due process. This blatant violation of due process alone justifies the grant of Certiorari to review the judgment.

2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING POLICE ACTIONS AND STANDARDS OF DUE PROCESS.

The opinion below reflects a total disregard for the petitioner's rights against self-incrimination, right to counsel, right to be secure in his home against unreasonable searches, and the guarantee of due process of law. This case is a classic example of the police's over reaching and trampling the rights of an accused. Such action is prohibited by our Constitution and due to be reversed.

The decision below on the search and seizure issue is contrary to the decision in Berryhill v. State, 372 So.2d 355 (Ala.Civ.App. 1979). In Berryhill, supra, the disclosure of contraband in a closed van by the shining of a flashlight through an aperture the width of a penny was held not to be classified as in "plain view".

In denying Certiorari below, the Alabama Supreme Court was troubled by the opinion of the Alabama Court of Criminal Appeals and stated it did not wish to be understood as approving all of the language used in the decision under review.

The probation revocation hearing in issue, clearly violated the Alabama decisions in Armstrong v. State, 294 Ala. 100, 312 So.2d 620 (1975) and Jenkins v. State, 368 So.2d 329 (Ala.Crim.App. 1979), which followed this Court's prior decisions.

The prior decisions of this Court are due to be reiterated, and call for the grant of Certiorari in the case at bar. Clearly, a reversal of the larceny charge would warrant a reversal of the probation revocation decision.

CONCLUSION

For the foregoing reasons, a writ of Certiorari should issue to review the judgment and opinion of the Alabama Court of Criminal Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Writ has been mailed this date by certified mail to the Honorable Charles A. Graddick, Attorney General, at his office, 250 Administrative Building, Montgomery, Alabama, 36130.

Dated this the 12th day of August, 1980.

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APPENDIX A

MARCH 18, 1980

THE STATE OF ALABAMA --- JUDUCIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1979-80

6 Div. 80

Dennis James Bartlett

v.

State

Appeal from Cullman Circuit Court

CLARK, RETIRED CIRCUIT JUDGE

This is an appeal from a judgment convicting appellant and sentencing him to imprisonment for five years for grand larceny of an "Acetylene Welder Set."

A major insistence of appellant is that the trial court erred in overruling defendant's motion to suppress as evidence the specified personal property that was found without a search warrant therefor in the garage of defendant, appellant contending, as he did on the trial, that there was a violation of his right to freedom from unreasonable search and seizure guaranteed by the Fourth Amendment to the Constitution of the United States.

The garage in which the stolen property was located was a two-car garage with a door for each car. It was located on two separate lots with half of the garage on one lot and the other half on the other, the

line of division being the boundary line between the two lots as it ran from midway between the two doors to a point at the center of the back of the garage. There was no partition or marker of any kind between the two parts of the inside of the garage. Defendant and his wife lived in a dwelling on one of the lots and used as a garage that part of the two-car garage that was on the same lot; Mr. and Mrs. Holder and family lived in the dwelling on the other lot and used as a garage that part of the two-car garage on that lot.

On January 10, 1979, the owner of the welding set reported the theft thereof to Deputy Dennis Spradlin, an investigator with the Cullman County Sheriff's Office. Deputy Spradlin obtained a description of the property and the names of three people that had recently been engaged in construction work at the site from which the welding set was stolen. One of the three was Dennis Bartlett. Unable to locate Mr. Bartlett at his work, Deputy Spradlin proceeded on January 11, 1979, to Mr. Bartlett's residence, accompanied by another officer. Both doors of the two-car garage were closed. He went to the back door of defendant's residence and knocked on the door; Mrs. Bartlett came to the door; he inquired whether Mr. Bartlett was at home, and she replied that he was not. He asked her if he could look in her garage and she said, "No."

Deputy Spradlin testified that he then went to the residence of Mr. and Mrs. Holder, let her know what he was looking for, and asked her permission to search her garage. She gave her permission and manifested it by her signature to a consent search form. The deputy then walked into the Holder's side of the garage; he did not go into the Bartlett's side, but he saw therein a welding set in plain view, which matched the description of the set given to him by the owner of the stolen set. According to his further testimony, he and his accompanying officer then returned to their automobile, and he phoned headquarters, while he was in the process of advising headquarters and the office of the district attorney, Mr. Bartlett drove up in an automobile. The officer told him "what we were doing, told him why we [at that time Mr. Larry Waldrip had joined them] were there and I needed to know where the acetylene tank came from." Mr. Bartlett

then excused himself to go to the bathroom and promptly returned. He said, "he didn't know where it came from." The officer asked Mr. Bartlett if he would consent to their going into "his side of the garage." Mr. Bartlett advised that they "could." They walked back through the Holders' side of the garage and went into Mr. Bartlett's side. His testimony continues as follows:

> "I advised Mr. Bartlett that the description of the acetylene tank set there fit the one that we had stolen. I asked him to come to the office with us; we needed to talk to him about it. I told him that we needed to take the tank set with us, he said he didn't care and I instructed Larry Waldrip and David Sandlin to put the tank set in the car. Mr. Bartlett rode up to the county jail with me.
>
> "Q. Was Mr. Bartlett ever placed under arrest?
>
> "A. No.
>
> "Q. Was he ever handcuffed?
>
> "A. No, sir.
>
> "....
>
> "Q. What happened at the county jail?
>
> "A. I took Mr. Bartlett, I got a cold drink and asked Mr. Bartlett if he wanted something to drink, and I read his rights to him, again, asked him about the tank set."

Further testimony of Deputy Spradlin was to the effect that before obtaining any further information from appellant, the officer proceeded to read and explain to him his rights from the regular form, including his right to an attorney, and while in the process of doing so appellant "advised that he would like to call his lawyer."

Deputy Spradlin then handed Mr. Bartlett the phone book and appellant proceeded to call his named lawyer, who was either busy or not in his office. Mr. Bartlett left word for him with his secretary to tell him that he was at the county jail. Spradlin further testified: "We talked a few more minutes and he tried to call back, he was still not at his office. He tried two or three times to get ahold of Mr. [his named attorney], we kept talking back and forth about the tank set and so forth, and finally he stated to me that he would give me a statement. I proceeded to take a statement and [his named lawyer] came in about middle way of the statement." The officer then left defendant and his lawyer to themselves in another room, where they were for approximately "ten minutes," with the statement in the handwriting of the officer that appellant had given him orally but which statement was not fully completed. Upon the return of Mr. Bartlett and his attorney from the office, Officer Spradlin was advised by the attorney that Officer Spradlin could complete the statement made by Mr. Bartlett for Mr. Bartlett's signature. The statement was comprehensive as to all requirements as to voluntariness and Miranda warnings against self-incrimination and the right to counsel, at the expense of the state if necessary.

On the motion to suppress evidence as to finding the stolen property in the garage of appellant and taking it to headquarters, defendant offered the testimony of Mrs. Holder, Mrs. Bartlett and Mrs. Bartlett's mother as to what they observed about Officer Spradlin's activities while on or about the premises of the Holders and the Bartletts, in an effort to show an illegal search and seizure. As a whole the testimony is rather lengthy, but nothing has been specified therein on appeal as in conflict with the testimony of Officer Spradlin other than testimony by one or more of them to the effect that before Officer Spradlin obtained the consent of Mrs. Holder to enter their side of the garage, he was peeping into a crack of the garage or under a door thereof.

The court was not in error in overruling defendant's motion to suppress the stolen property as evidence, or in overruling defendant's objection to its

introduction in evidence. Officer Spradlin's entry into the Holders' side of the garage had the consent of the only person on the premises at the time who had authority to consent to such entry. It is an established prinicple of law, on the subject of consent to search and seizure, that where two or more responsible persons are in joint occupancy of particular premises, with coequal rights therein, any one of them, in the absence of some special reason to the contrary, can give a valid and effective consent to a warrantless search thereof. As stated by Judge Tyson in Scott v. State, Ala. Cr. App., 337 So. 2d 1342, 1346-1347 (1976):

> "... In the area of 'consent searches,' it has explicitly been recognized that certain third parties may validly consent to the inspection of premises or effects of an absent non-consenting defendant if such third party share with the defendant 'common authority over or other sufficient relationship to the premises or effect sought to be inspected.' United States v. Matlock, 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242. See also Myers v. State, 55 Ala. App. 404, 316 So. 2d 235 (1975), and authorities cited therein; Hawkins v. State, Ala. Cr. App., 333 So. 2d 846 (1976)."

A fortiori the right to make a warrantless search of a portion of a jointly occupied or used building does not require the consent of one of two or more joint users who has no legal interest in the particular portion of the building searched.

If there were any real conflict between the testimony of Officer Spradlin and the other witnesses as to any peeping or peering into the garage, the trial court had the authority to accept the testimony of Officer Spradlin on the subject. If, on the other hand, the trial court was of the view that there was some peering or peeping by Officer Spradlin, it was justified in concluding that the same was immaterial, in that it could have revealed nothing significant and that it occurred as to that part of the garage as to which defendant had no standing to complain.

Another major contention of appellant is as to the action of the court in overruling defendant's motion to suppress the oral statements of appellant of an incriminatory nature and his written confession, and in overruling defendant's objections to their introduction in evidence. The testimony, chiefly out of the presence of the jury, as to the voluntariness, Miranda warnings against self-incrimination and advice as to defendant's right to an attorney, was lengthy and was obviously received by the trial court with great patience, deliberation and consideration. The testimony included that of defendant. He acknowledged in his testimony that he read and understood the statement that he signed. His testimony was in accord with that of Officer Spradlin that he called his attorney three times, that when his attorney came, the attorney and he looked over the statement that had been prepared for his signature by Officer Spradlin, that his attorney advised him to sign it and that he did so. Notwithstanding a possible basis for disapproval of the action of the officer in not waiting longer for defendant's attorney to arrive before continuing a discussion of the matter with defendant, we cannot say that the failure to wait longer was any more attributable to the officer than to defendant. The trial court was justified in holding that the statements of defendant and his written confession were made voluntarily, knowingly and intelligently. Evidence thereof was properly admitted.

During the direct examination of Officer Spradlin, in the presence of the jury, as to what was happening during the time he and defendant were at the desk where defendant was attempting to contact his lawyer by telephone, the following occurred:

> "Q. All right, what happened after he finished his phone call on the second call?
>
> "A. He advised me he was not back yet.
>
> "Q. Do you remember what occurred after this second call?

> "A. I kept talking to him and he advised me then he was on probation for grand larceny. He wanted to know what would happen, I told him I could not promise him nothing, I don't know what would happen to his probation.
>
> "MR. SHAMBLEE: I object to that, that is a matter to take up outside the presence of the jury."

Thereupon, out of the presence of the jury, defendant moved for a mistrial, saying that the answer of the witness was so damaging to defendant that the court could not remove the prejudice by instruction to the jury. The court overruled the motion for a mistrial and thereafter instructed the jury, without repeating the witness' answer to the question last asked him, to "put that answer out of your mind, that is not evidence for you to consider for any purpose in this case." The matter was concluded as follows:

> "[COURT] Now, is there any one of you that can't do that, if so raise your hand and let the record show there is not a hand up. You understand under your oath, you are telling me that you will not utilize Officer Spradlin's last answer for any purpose at all in this case.
>
> "Anything else?
>
> "MR. SHAMBLEE: We have taken care of it.
>
> "THE COURT: Thank you very much."

Appellant postulates his present contention that his motion for a mistrial should have been granted by saying that it was "prejudicial testimony specifically barred by the court previously." It is correct that the court, in a hearing out of the presence of the jury, had instructed State's counsel:

> "And you can't ask the defendant or anybody else in the presence of the jury if he testified about any prior conviction or probation or anything like that."

If State's counsel had intentionally asked a question that called for the answer as given by the witness, State's counsel would have been subject to severe censure. We are not persuaded that he did so, or that the answer was any more surprising to defendant's counsel that it was to counsel for the State. Whether the witness deserved censure for the answer depends upon whether he actually heard and understood the previous instruction of the court directed to counsel for the State. We cannot assume that he did, although, being present, he should have heard it. This leaves an unfortunate answer as to which it cannot be said with reasonable certainty that it was made in defiance of the court's instruction. The court was acting within its province in overruling the motion for a mistrial and thereafter emphatically removing the objectionable matter from the consideration of the jury.

Perhaps it should be said also that during the hearing out of the presence of the jury, there was definite evidence that defendant, at the time of the larceny in the instant case, was on probation on previous convictions and concurrent sentences for grand larceny and that during his talks with Officer Spradlin, after his apprehension in the instant case, he informed Officer Spradlin as to his status. The prosecution did not insist that his conversation as to his status was competent evidence to present to the jury, even though conceivably it may have been. The court's direction to State's counsel not to ask any questions along that line was obviously prompted by an effort of the court to handle the matter before it with absolute impartiality, and particularly with due regard for the rights of the defendant, and without any intimation that State's counsel would endeavor to introduce evidence as to defendant's probationary status. It should also be observed that there is nothing in the record to indicate that the jury was expressly or impliedly informed that the sentences as to which defendant was on probation were for convictions of larceny or the like.

There is no error in the record prejudicial to defendant. The judgment of the trial court should be affirmed.

The foregoing opinion was prepared by Retired Circuit Judge Leigh M. Clark, serving as a judge of this Court under the provisions of § 6.10 of the New Judicial Article (Constitutional Amendment No. 328); his opinion is hereby adopted as that of the Court. The judgment below is hereby

AFFIRMED.

All the Judges concur.

APPENDIX B

COURT OF CRIMINAL APPEALS

STATE OF ALABAMA

P. O. BOX 351

MONTGOMERY 36101

JOHN O. HARRIS
Presiding Judge

MOLLIE JORDAN
Clerk

JOHN C. TYSON, III
JOHN P. DeCARLO
JOHN G. BOOKOUT
WILLIAM M. BOWEN, JR.
Judges

March 18, 1980

RE: Dennis James Bartlett v. State
6th Div. 7. Cullman Circuit Court
Nos. CC-77-80, CC-77-81, CC-77-82

The Court of Criminal Appeals today announced the following decision in the above-styled cause:

"March 18, 1980. Affirmed on authority of Bartlett v. State, 6 Div. 80, released this date. Per Curiam. All the Judges concur."

APPENDIX C

JUN 20, 1980

THE STATE OF ALABAMA - - - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1979-80

Ex Parte Dennis James Bartlett

79-576 PETITION FOR WRIT OF CERTIORARI TO COURT OF CRIMINAL APPEALS

(In re: Dennis James Bartlett

v.

State of Alabama)

ALMON, JUSTICE.

Petition of Dennis James Bartlett for writ of certiorari to the Court of Criminal Appeals to review and revise judgment and decision of that court in Bartlett v. State, Crim. 6 Div. 80, March 18, 1980, is denied.

In denying the petition for writ of certiorari in this case, this Court does not wish to be understood as approving or disapproving all of the language used or the statements of law made in the opinion of this case in the Court of Criminal Appeals. In re Horsley v. Horsley, 291 Ala. 782, 280 So. 2d 155 (1973).

WRIT DENIED.

Torbert, C. J.; Faulkner, Shores and Embry, JJ., concur.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 20 day of June 1980

/s/ J. O. SENTELL
Clerk, Supreme Court of Alabama

OCT
MICHAEL ROD

NO. 80-238

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

DENNIS JAMES BARTLETT,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF
CRIMINAL APPEALS OF ALABAMA

BRIEF FOR RESPONDENT STATE OF ALABAMA IN OPPOSITION TO PETITION FOR CERTIORARI

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

THOMAS R. ALLISON
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

ADDRESS OF COUNSEL:

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QUESTIONS PRESENTED

1. Whether petitioner had standing to question validity of consent search of neighbor's garage.

2. Whether petitioner's confession was admissible where Miranda rights were given on two occasions and statement was completed after attorney arrived and was signed on advice of counsel.

3. Whether the question of petitioner being denied due process in probationary hearing is within the jurisdiction of the Supreme Court where this issue was not properly presented to the highest court of the State and was not reviewed.

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NO. 80-238

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

DENNIS JAMES BARTLETT,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF
CRIMINAL APPEALS OF ALABAMA

BRIEF FOR RESPONDENT STATE OF ALABAMA IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals in Case 6 Division 80, not yet reported, appears in petitioner's Appendix with the denial of certiorari by the Alabama Supreme Court.

On March 18, 1980, the Alabama Court of Criminal Appeals affirmed petitioner's probation revocation hearing in Case 6 Division 7 without opinion.

JURISDICTION

Petitioner asserts that this Court has jurisdiction under 28 U.S.C. § 1257 (3), and has presented issues from two separate cases. It is respondent's position that this Court is without jurisdiction to consider issue number three pertaining to probation revocation since this issue was never properly presented to the highest court of the State and was not expressly passed on by the Alabama Supreme Court.

STATEMENT OF THE CASE

(6 Division 80)

Respondent adopts the Statement of the Case as set forth in the Opinion of

the Alabama Court of Criminal Appeals with the addition of:

After Deputy Spradlin was refused permission to search petitioner's side of the garage by his wife, the following questions were asked Deputy Spradlin by the District Attorney: (TR-72).

"Q. All right, after you talked to Mrs. Bartlett, what did you do at that time?

A. I went next door to the Holder residence.

Q. What did you do there?

A. I explained to Mrs. Holder we had suspicion to believe that there was stolen property in the garage, I asked her if I could have consent to look at her side.

Q. Did she in fact, give you consent?

A. Yes, she signed the consent to

search her side of the garage."

Deputy Spradlin was never questioned about any peeping through a hole under the garage door. Defense witness Lynn Holder testified that she was looking out of her window before Deputy Spradlin contacted her and observed the following: (TR. 139-140).

"QUESTION (BY MR. CHAMBLEE):

Q. Where was deputy Spradlin when you specifically saw him about the garage, what was he doing?

A. Well, he was looking around the garage and then he looked through the peepholes, he bent down on my side and looked under the garage."

(Emphasis respondent's).

When the defendant Dennis Bartlett arrived at his home, Deputy Spradlin read him his rights from a Miranda card (TR. 169). After the stolen property was

recovered Bartlett was taken to the county jail where his Miranda rights were again read to him (TR. 173).

No threats or promises or hope of reward was made to Bartlett (TR. 178). Bartlett stated that he wanted an attorney and his attorney was called immediately. While awaiting the arrival of Attorney Wayne Fuller, Deputy Spradlin talked to the defendant who agreed to give a statement. Mr. Fuller arrived before Bartlett's statement was completed (TR. 178) and carried the statement into a private room where he had a conference with Bartlett for about ten minutes (TR. 179).

When Bartlett and his attorney returned from their conference, Mr. Fuller gave Deputy Spradlin permission to complete the statement (TR. 179). The defendant then read the statement

and signed it in the presence of his attorney and upon advice of counsel (TR. 179).

The time span from Bartlett's arrival upon the scene until his confession was given was about thirty minutes (TR. 83).

STATEMENT OF THE CASE

(6 Division 7)

On September 23, 1977, Dennis James Bartlett was placed on probation for a period of five years in three grand larceny cases (TR. 2).

On January 10, 1979, he was arrested on charges of grand larceny which was prosecuted as case 6 Division 80. On February 15, 1979, the probation officer served notice of the probation revocation hearing which defense counsel received (TR. 2-3).

On February 20, 1979, a full judicial

hearing was held in the Circuit Court of Cullman County, Alabama. The State presented evidence that Bartlett had stolen an acetylene welder set. The defendant, represented by his retained counsel, had every opportunity to cross-examine witnesses and to present evidence in his own behalf (TR. 3-19).

At the conclusion of the hearing the trial court stated in open court: (TR. 19).

> "Let the record show after the hearing on the testimony on revocation the Court holds that the defendant stole the acetylene welder while on probation, his probation is revoked and he will serve his sentence."

On March 18, 1980, the Alabama Court of Criminal Appeals affirmed Bartlett's probation revocation without an opinion. In

the application for rehearing on April 1, 1980, petitioner failed to invoke Rule 39 (k) of the Alabama Rules of Appellate Procedure, and in a "no opinion" affirmance there was nothing for the Supreme Court to review.

On June 20, 1980, (Case 79-577) the Supreme Court of Alabama denied Bartlett's petition for certiorari without opinion.

REASONS FOR DENIAL OF THE WRIT

1. PETITIONER HAS NO STANDING TO QUESTION VALIDITY OF CONSENT SEARCH OF NEIGHBOR'S GARAGE.

Petitioner contends that a peeping through a crack under the garage door prior to obtaining the consent of Mrs. Holder to search her side of the garage resulted in an illegal search.

The decision of the Alabama Court of Criminal Appeals addressed this very sub-

ject by stating: (Petitioner's Appendix, 5a).

> "If there were any real conflict between the testimony of Officer Spradlin and the other witnesses as to any peeping or peering into the garage, the trial court had the authority to accept the testimony of Officer Spradlin on the subject. If, on the other hand, the trial court was of the view that there was some peering or peeping by Officer Spradlin, it was justified in concluding that the same was immaterial, in that it occurred as to that part of the garage as to which defendant had no standing to complain."

Petitioner seeks a review of the evidence or the inferences drawn from it. The U. S. Supreme Court will not grant a writ of certiorari in such instances. General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 82 L. Ed. 1273, 58 S. Ct. 849 (1938).

The witness for the defense, Mrs. Holder, testified that prior to the time she gave her consent to have her side of the garage searched she observed Deputy Spradlin on one occasion peep through the crack and stoop down and look under the garage door (TR. 140). She described the peeping by stating, "he bent down on my side and looked under the garage" (TR. 139).

If any peeping occurred it was on the property of Mrs. Holder and the petitioner has no standing to object. A person who is aggrieved by the introduc-

tion of damaging evidence secured by a search of a third person's premises or property does not have any of his Fourth Amendment rights infringed. Rakas v. Illinois, 439 U.S. 128, 58 L. Ed. 2d 387, 99 S. Ct. 421 (1978).

The neighbor, Mrs. Holder, a third party, voluntarily gave proper consent to have her side of the garage searched. A search of property, without a warrant and without probable cause, but with proper consent voluntarily given is valid under the Fourth Amendment. United States v. Matlock, 415 U. S. 164, 39 L. Ed. 2d 242, 94 S. Ct. 988 (1974).

2. PETITIONER'S CONFESSION WAS ADMISSIBLE WHERE MIRANDA RIGHTS WERE GIVEN ON TWO OCCASIONS AND STATEMENT WAS COMPLETED AFTER ATTORNEY ARRIVED AND WAS SIGNED ON ADVISE OF COUNSEL.

When the defendant Dennis Bartlett arrived at his home, Deputy Spradlin read

him his rights in compliance with Miranda v. Arizona, 348 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966) (TR. 169). After the stolen property was recovered Bartlett was taken to the county jail where his Miranda rights were again read to him (TR. 173).

Bartlett stated he wanted an attorney and Mr. Fuller was immediately called. Attorney Fuller was not in his office and a second and third call was made shortly thereafter. While awaiting arrival of the attorney, Deputy Spradlin talked to the defendant, who agreed to give a statement. Mr. Fuller arrived before the statement was completed (TR. 178). Mr. Fuller carried the statement into a private room and conferred with his client for about ten minutes (TR. 179).

When Bartlett and his attorney returned from their conference, Mr. Fuller

gave Deputy Spradlin permission to complete the statement (TR. 179). The defendant then read the statement and signed it in the presence of his attorney and upon advice of counsel (TR. 179).

In the voir dire hearing, before the trial judge determined that the confession was voluntarily made he considered both the characteristics of the accused and the details of the interrogation (TR. 82-88). He considered such factors as: (1) The defendant was 22 years old and married (TR. 83). (2) That he had previous experience as a law violator (TR. 84). (3) That the defendant affirmatively stated he understood what his rights were (TR. 75-76). (4) That no threats or promises were made (TR. 85). (5) That the total time span was only 30 minutes during which the defendant was advised of his rights not once but <u>twice</u> (TR. 83). (6) That the defendant's attorney arrived

before the statement was completed, conferred with his client in private, and studied the statement (TR. 87). (7) That the statement was completed in the presence of counsel and was signed upon advice of counsel (TR. 87).

When the totality of circumstances are considered, it is clearly evident the statement was voluntarily given and was admissible as evidence. Schneckloth v. Bustamonte, 412 U.S. 218, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973).

3. THE SUPREME COURT HAS NO JURISDICTION TO REVIEW ISSUE WHICH WAS NOT PROPERLY PRESENTED AND REVIEWED BY STATE'S HIGHEST COURT.

On March 18, 1980, the Alabama Court of Criminal Appeals affirmed Bartlett's probation revocation in Case 6 Division 7 without opinion. The scope of review of the Supreme Court of Alabama is ordinarily limited to the

facts stated in the opinion of the Court of Criminal Appeals. Rule 39 (k), Alabama Rules of Appellate Procedure.

On April 1, 1980, petitioner failed to follow correct procedural law in a "no opinion" affirmance and failed to invoke Rule 39 (k) in his application for a rehearing before the Court of Criminal Appeals.

The Alabama Supreme Court has held that in the absence of a petitioner invoking Rule 39 (k) ARAP in a "no opinion" affirmance the petition is due to be stricken and the writ will be denied. See: Adam v. State, 362 So. 2d 654 (1978) and Deerman v. State, 370 So. 2d 1107 (1979).

The Federal question (due process in the probation revocation hearing) was not expressly passed on by the highest state court, due to a failure to conform to

State procedure.

A similar jurisdictional question was raised in Street v. New York, 394 U. S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969), where it was held that if the question is not presented to the State courts in such a manner that it is decided by the highest court of the State when it affirms the conviction, then the Supreme Court has no power to consider the matter.

In Michigan v. Tyler, 436 U. S. 499, 56 L. Ed. 2d 486, 98 S. Ct. 1942 (1978) the Supreme Court held that the failure of a litigant to follow proper procedure resulting in the refusal of a State Court to consider a question, constitutes adequate grounds for barring review in the U. S. Supreme Court so long as the State has a legitimate interest in enforcing its procedural rule.

In this instant case there was nothing before the Alabama Supreme Court for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Charles A. Graddick

/s/ Charles A. Graddick
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Thomas R. Allison

/s/ Thomas R. Allison
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CERTIFICATE OF SERVICE

I hereby certify that on this the 3rd day of October, 1980, I served three copies of the foregoing Brief and Argument in Opposition to Petition for Writ of Certiorari to the Court of Appeals of Alabama on each attorney for petitioner by placing same in the United States mail, postage prepaid and properly addressed as follows:

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